Supreme Court, U.S.
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No. 97-___

In The

Supreme Court of the United States

October Term, 1997

DONALD A. DiMARTINI,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

IS JUDICIAL IMMUNITY A PROPER REMEDY WHEN A DEFENDANT WOULD OTHERWISE BE DENIED HIS DUE PROCESS RIGHT TO PRESENT EXCULPATORY EVIDENCE AT TRIAL?

PARTIES TO THE PROCEEDING

In addition to Petitioner Donald A. DiMartini, the parties in the Ninth Circuit Court of Appeals included co-appellants/co-defendants George Lovett and Richard G. Randall and Respondent, appellee below, United States of America.

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PETITION FOR WRIT OF CERTIORARI

Donald A. DiMartini, the petitioner in the above-captioned case, respectfully prays that a Writ of Certiorari issue to review the opinion of the United States Court of Appeals for the Ninth Circuit entered on February 11, 1998.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit was filed on February 11, 1998 and captioned as *United States v. Lovett, Randall and DiMartini*, (9th Circuit numbers 96-10488, 96-10507, 96-10508). It was not published. A copy of that opinion appears herein as Appendix "A."

JURISDICTION

The federal district court had jurisdiction over Petitioner's case pursuant to 18 U.S.C. section 3231. The Ninth Circuit Court of Appeals had jurisdiction over an appeal from a final judgment of a district court under 28 U.S.C. section 1291. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. section 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Fifth Amendment to the United States Constitution: No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of

a Grand Jury . . . nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . .

STATEMENT OF THE CASE AND FACTS

A. Procedural History

A superseding indictment was returned in the District of Arizona on November 25, 1995, charging Donald A. DiMartini, hereafter just DiMartini, and five others with mail fraud, wire fraud, money laundering, and conspiracy to launder money. All of the charges stemmed from the defendants' participation in the operation of American Choice Corporation, hereafter just ACC, a telemarketing company. After a joint trial in the federal district court, the defendants, including DiMartini, were convicted of various mail and wire fraud offenses. DiMartini was sentenced to total term of 168 months in federal prison for his role in the offenses of conviction.

B. Factual History

Evidence presented by the government at trial established the following facts. DiMartini incorporated ACC in the State of Arizona in April, 1994. He owned essentially all of the stock of the company. DiMartini and co-defendant Richard Randall ran ACC as partners and split the profits evenly. To help run the company DiMartini and Randall hired an accountant and office manager, and

retained an attorney who had expertise in telemarketing law. ACC was in operation for only seventeen months.

ACC sold a variety of products over the telephone including cosmetics and cleaning items. As part of the company's telephone sales presentation ACC salespersons solicited customers by telephone to participate in a sales promotion program by offering them an opportunity to win a variety of awards. Customers were told by ACC salespersons, however, that in order to obtain the awards they had to purchase a product. Often the customers were led to believe that the value of the award would far exceed the price paid for the products that ACC was selling. In fact, each salesperson knew that the customer would be receiving an award that was worth much less than the purchase price of ACC's products.

ACC salespersons were divided into two groups, "fronters" and "reloaders." Salespersons who worked in the "frontroom" solicited customers to make small purchases. After a front room sale was made and the product was delivered, a "reloader" would then call the customer and attempt a larger sale. Reload customers were often told by salespersons that they had been selected to receive a more valuable prize and were included in a potentially more rewarding promotion. The purpose of the telephone call was to "sell" the award to the customer, not the product. Some customers were "reloaded" or sold products six or seven times.

Each sale was verified by a salaried employee of ACC. Verification calls were tape recorded. These calls were designed to lock-in the sale and prevent the customers from changing their mind. Customers were told

during these calls that there were no cash refunds or cancellations of the sale.

DiMartini and Randall helped train the fronters and reloaders. ACC also had a number of strict rules. When reloaders were hired they had to sign a form acknowledging that they would be immediately fired if they were found making misrepresentations to customers.

In mid-1995, after DiMartini and Randall returned from a meeting with ACC's attorney, new, more strict, rules were imposed. Reloaders had to sign agreements promising not to make any misrepresentations to customers. Lists of things salespersons could and could not say to customers were posted on the walls. The office manager, Mimi Bundy, was directed to tape record conversations between salespersons and customers in an effort to closely monitor and supervise sales presentations. A significant part of Bundy's duties at ACC consisted of listening to recorded sales presentations to ensure that no misrepresentations were being made by salespersons. If misrepresentations were made, Bundy was to discipline the salesperson. DiMartini relied upon Bundy to enforce ACC company policy against misrepresentations.[1] However, she failed to perform that task. The salespersons thought the rules were a joke and simply ignored them. As a result, as several salespersons testified at trial, ACC sales presentations contained numerous material misrepresentations. Numerous customers were falsely told that they had been selected out of thousands

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[1] After Bundy was hired to be the office manager, DiMartini spent less time in the office.

to receive the top or biggest award. Some customers were told their purchase of ACC products would help a good or charitable cause. Salespersons often used different names for promotions such as the "anniversary promotion" and held themselves out as corporate executives such as "sales director" and "regional director." Several customers testified that they were told by ACC salespersons that they had won part of a $1.5 million award. However, to receive this award they had to keep buying ACC products. Many of the customers considered the products worthless and had no use for them.

After learning that a grand jury was investigating it and other telemarketing companies, ACC had its attorney evaluate the company. The lawyer concluded that Bundy had failed to enforce ACC's policy against misrepresentations in sales presentations. She had listened to very few of the tapes of the sales presentations and only reprimanded one salesperson.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted in this case to reconcile a conflict between the circuits on the important issue of whether judicial immunity is a proper remedy when a defendant would otherwise be deprived of his due process right to present exculpatory evidence at trial.

A. Factual Background

Several ACC salespersons testified as government witnesses at trial. Each had been indicted but testified at trial pursuant to plea agreements with the government. Each salesperson who testified for the government

admitted that they made numerous and frequent misrepresentations during sales presentations to ACC customers.

DiMartini was the owner and co-operator of ACC. His defense at trial to the mail and wire fraud charges was that ACC company policy prohibited salespersons from making misrepresentations to potential customers.[2] When he became aware that misrepresentations were being made by salespersons, DiMartini took steps to enforce the company policy against such misrepresentations. One key step taken by DiMartini to enforce the policy against misrepresentations was the hiring of Bundy. However, only after DiMartini had ACC's lawyer conduct an evaluation of the company did DiMartini learn that Bundy was not doing her job.

Bundy was not indicted by the grand jury. The government called Bundy as a witness at trial. The district court *sua sponte* warned Bundy that her testimony could incriminate her and instructed her on her Fifth Amendment right not to testify. The district court also appointed a lawyer to represent her. Bundy's court appointed lawyer subsequently indicated that if called, she would invoke her Fifth Amendment right against self-incrimination and refusal to testify.[3]

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[2] The offenses of mail and wire fraud require that the defendant obtain money or property by means of material misrepresentations or false and fraudulent pretenses. *United States v. Halbert*, 640 F.2d 1000, 1007 (9th Cir. 1981).

[3] Of course, had the government been able to call Bundy as a witness she would have been subject to cross-examination by DiMartini and immunity would have been unnecessary.

DiMartini then sought to have Bundy testify for the defense. DiMartini requested that the district court compel the government to grant Bundy immunity from prosecution or, in the alternative, that the court itself grant Bundy immunity. The district court rejected both requests and Bundy did not testify at trial.

Among other issues presented, DiMartini argued in the Ninth Circuit: "Upon the defense's request to immunize Ms. Bundy, and the prosecution's refusal to do so, together with the court's refusal to intervene and grant judicial immunity, the Appellant's Sixth Amendment right to the benefit of exculpatory evidence was implicated and the (district) Court should have exercised its inherent authority to immunize her to provide testimony for the defense. *Government of the Virgin Islands v. Smith*, 615 F.2d 964 (3rd Cir. 1980)." (Appellant's Reply Brief, pp. 12-13.) The Ninth Circuit rejected this argument without discussion.

Like most other circuits, the Ninth Circuit has never recognized judicial immunity as means to ensure that a defendant can present exculpatory evidence at trial. See, e.g., *United States v. Mendia*, 731 F.2d 1412, 1414 (9th Cir. 1984). In *Government of the Virgin Islands* the Third Circuit did recognize judicial immunity as a proper remedy when a defendant would otherwise be deprived of his due process right to present exculpatory evidence. Pursuant to Rule 10 of the *Rules of the Supreme Court* this Court should grant certiorari in this case to resolve this clear split of authority.

B. Certiorari Should Be Granted To Resolve The Split Of Authority Among The Circuit Courts Of Appeal

Building upon the foundation of two earlier Third Circuit cases, the court of appeals held in *Government of the Virgin Islands v. Smith, supra,* 615 F.2d at 970 that judicial immunity "may be required for a defense witness if realistic meaning is to be given to a defendant's due process right to have exculpatory evidence presented to the jury." The Third Circuit found the situation "the same as" that presented in *Chambers v. Mississippi,* 410 U.S. 284 (1973). In *Chambers,* the state court's strict adherence to its own hearsay rules prevented the defendant from presenting trustworthy and exculpatory evidence. This Court held that "[f]ew rights are more fundamental than that of an accused to present witnesses in his own defense" and "the hearsay rule may not be applied mechanistically to defeat" that right. *Id.,* at 302. The Third Circuit in *Government of the Virgin Islands v. Smith* similarly found that due process is violated when a defendant is denied the opportunity to present exculpatory evidence at trial as a result of the government's failure to extend immunity to a defense witness. Concluding that it was "not concerned with a new or unique constitutional right, but rather with the prescription of a new remedy to protect an established right," the Third Circuit "found an inherent judicial power to grant witnesses immunity in order to vindicate" a defendant's right to present exculpatory evidence at trial. *Government of the Virgin Islands v. Smith, supra,* 615 F. 2d at 971.

The Third Circuit has not overruled *Government of the Virgin Islands v. Smith* and continues to apply the holding

of that opinion to cases that come before it. See, e.g., *United States v. Hamilton*, 46 F.3d 271, 278 (3rd Cir. 1995); *United States v. Santtini*, 963 F.2d 585, 597 (3rd Cir. 1992); *United States v. Bazzano*, 712 F.2d 826, 840 (3rd Cir. 1983); *United States v. Lowell*, 649 F.2d 950, 964 (3rd Cir. 1981).

On the other hand, nearly every other circuit court of appeal has rejected judicially created immunity. Calling the holding of *Government of the Virgin Islands v. Smith* the "effective defense theory" the First Circuit in *United States v. Angiulo*, 897 F.2d 1169, 1191 (1st Cir. 1990) stated: "Under this theory, the court itself has the inherent power to grant immunity. The power is grounded in a defendant's due process right to have exculpatory evidence presented to the jury." However, the First Circuit in *Angiulo* went on to note: "This theory has been rejected by virtually every other court that has considered the issue." *Id.* citing *United States v. Paris*, 827 F.2d 395, 399 (9th Cir. 1987); *United States v. Tindle*, 808 F.2d 319, 325 fn. 4 (4th Cir. 1986); *United States v. Sawyer*, 709 F.2d 1494, 1506 (11th Cir. 1986); *United States v. Pennell*, 737 F.2d 521, 526 (6th Cir. 1984); *United States v. Turkish*, 623 F.2d 769, 775-776 (2nd Cir. 1980). See also *United States v. Castro*, 129 F.3d 226, 232 (1st Cir. 1997); *United States v. Hohney*, 949 F.2d 1397, 1401 (6th Cir. 1991); *United States v. Payton*, 878 F.2d 1089, 1092 (8th Cir. 1989); *United States v. Chagra*, 669 F.2d 241, 258 (5th Cir. 1982). As the First Circuit noted in *United States v. Angiulo, supra*, 897 F.2d at 1191, most of the circuit courts of appeal that reject the ruling of *Government of the Virgin Islands v. Smith* do so on the "theory that it would pose separation of power problems for courts to assume inherent authority to grant judicial

immunity themselves." These courts conclude that witness immunity is of a legislative origin and for the judiciary to exercise this power in the absence of a legislative grant would violate separation of power principles.[4]

This Court has twice noted the split between the Third Circuit and the other circuits on the issue of judicial immunity. In *Autry v. McKaskle,* 104 S.Ct. 1458 (1984) Justice Marshall, joined by Justice Brennan, dissented from the denial of certiorari. Justice Marshall noted that the petitioner there sought reversal of his sentence of death based on *Government of the Virgin Islands v. Smith.* The Fifth Circuit denied relief "in part on the basis of its disagreement with the line of cases decided by the Third Circuit," primarily *Government of the Virgin Islands v.*

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[4] The claim that judicial immunity would violate separation of powers principles has never been subject to any meaningful analysis. See, e.g., *United States v. Mendia, supra,* 731 F.2d at 1414. This Court has long noted that Congress cannot preclude the federal courts from granting a remedy for a constitutional violation. *Smith v. Robinson,* 468 U.S. 992, 1012 fn. 15 (1984): " . . . the power of federal courts to grant relief necessary to protect against constitutional deprivations or to remedy the wrong done is presumed to be available in case within their jurisdiction." In *Simmons v. United States,* 390 U.S. 377 (1968) this Court created a form of judicial immunity for testimony at Fourth Amendment suppression hearings. There this Court found "it intolerable that one constitutional right should have to be surrendered in order to assert another." *Id.* at 394. Here, the argument is advanced by some circuit courts of appeal that a defendant must give up his fundamental constitutional right to present exculpatory evidence at trial because of concerns over "separation of powers principles." This Court has never accepted the supremacy of such "principles" over fundamental constitutional rights.

Smith. Id. at 1460. Justice Marshall concluded that certiorari should have been granted to resolve the conflict between the Fifth and Third Circuits.

Justice Marshall dissented again from the denial of certiorari in *Hunter v. California,* 111 S.Ct. 222 (1990). Again citing the Third Circuit's opinion in *Government of the Virgin Islands v. Smith,* Justice Marshall concluded: "I would grant the petition so that this Court can determine whether a criminal defendant has a due process right to judicially immunized testimony, and if so, what standards govern immunized-testimony requests in capital sentencing proceedings." *Id.,* at 224.

For almost twenty years now a split has existed between the circuit courts of appeal over whether judicial immunity is a proper remedy when, in cases such as this one, a defendant at a criminal trial cannot otherwise present exculpatory evidence. It is time for this Court to resolve this issue once and for all.

CONCLUSION

For the foregoing reasons, the instant Petition for a Writ of Certiorari should be granted.

Dated: May 7, 1998

Respectfully submitted,

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APPENDIX A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. GEORGE LOVETT, RICHARD G. RANDALL, and DONALD A. DiMARTINI, Defendants-Appellants.	No. 96-10488, 96-10507, and 96-10508 D.C. No. CR-95-00328-EHC **MEMORANDUM*** (Filed Feb. 11, 1998)

Appeal from the United States District Court
for the District of Arizona
Earl H. Carrol, District Judge, Presiding

Argued and Submitted January 14, 1998
San Francisco, California

Before: CHOY, SCHROEDER, and NOONAN, Circuit Judges.

Introduction

Appellants Donald A. DiMartini ("DiMartini"), Richard G. Randall ("Randall"), and George Lovett ("Lovett")

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

appeal their jury conviction for mail fraud and wire fraud stemming from their operation of American Choice Corporation ("ACC"), a telemarketing company which solicited customers to participate in purchasing promotions.

We AFFIRM in all respects.

Analysis

I. Separate Trials

Appellants argue that they were improperly denied separate trials. However, Appellants failed to preserve any potential error for an appeal.

It is well established that a motion for severance must be renewed at the close of evidence or it is waived. *U.S. v. Restrepo*, 930 F.2d 705, 711 (9th Cir. 1991). Granted, the renewal requirement is considered an "unnecessary formality" as long as the movant demonstrates "diligent pursuit." *U.S. v. Kaplan*, 554 F.2d 958, 965-66 (9th Cir. 1977). Yet other than a general assertion that the district court made it clear before and throughout the trial that it would not grant a motion to sever, Appellants fail to offer specific instances of "diligent pursuit." *See, e.g., U.S. v. Vasquez-Velasco*, 15 F.3d 833, 845 (9th Cir. 1994).

II. Motion to Suppress

Appellants argue that the Government impermissibly exceeded the scope of the search warrant by seizing virtually all of ACC's records. We disagree.

In this case, there was probable cause to believe that the alleged fraud permeated ACC in its entirety, justifying the general seizure which shut down the telemarketing operation. *See U.S. v. Offices Known as 50 State Distrib. Co.*, 708 F.2d 1371, 1374 (9th Cir. 1983).

Appellants respond that *50 State Distrib. Co.* addressed whether the *search warrant* itself was overbroad, not whether the *execution* exceeded the warrant's terms. Appellants argue that the terms of the warrant were limited to eight named victims.

However, the district court correctly concluded that the word "victim" as used in the search warrant was not intended to limit the documents seized to those relating to the named victims who had been previously defrauded by ACC. The Government was also interested in how the operations were conducted, who else had been contacted, and who might be contacted in the future. Accordingly, the affidavit depicted an entire business permeated with fraud which had victimized at least 47 people, only eight of whom were named.

III. Refusal to Grant Immunity to Defense Witnesses

Appellants assert that they were denied a fair trial because the Government refused to grant immunity to proposed defense witnesses Mary "Mimi" Bundy ("Bundy"), Donna Anderson ("Anderson"), and Doris Warren ("Warren"), leading each to invoke her Fifth Amendment right.

Generally, criminal defendants cannot compel the Government to grant immunity to a witness. *U.S. v.*

Young, 86 F.3d 944, 947 (9th Cir. 1996). However, defendants qualify for an exception to this rule upon showing that: 1) the testimony was relevant; and 2) the Government distorted the judicial fact-finding process by denying immunity. *Id.*

Nonetheless, Appellants fail to satisfy this two-part test.

IV. Exclusion of Mary Muchmore's Hearsay Testimony

Appellants planned to have Mary Muchmore testify regarding statements made by Bundy which included an admission that she had failed to listen to tapes of ACC sales representatives.

Although the testimony would have been hearsay, Appellants argued that Bundy's admission constituted a statement against her *penal* interest under Rule 804(b)(3) of the Federal Rules of Evidence. Independently, Appellants argued that Bundy's admission should have been admitted as proof of "third-party culpability." *See Perry v. Rushen*, 713 F.2d 1447 (9th Cir. 1983).

We find no merit to these claims.

V. Conduct of District Judge

Appellants allege that the district judge exhibited a high level of bias against them and a key defense witness, Alan Pick ("Pick"). Although the district judge demonstrated irascibility, he did not jeopardize Appellants' right to a fair trial. Significantly, most of the judge's remarks and conduct occurred outside the presence of the

jury. For example, the jury was not present for the exchange concerning Pick's honesty in which the judge unexpectedly left the bench. Neither was the jury present when the judge showed little regard for this court. "I may be in serious trouble with the Ninth Circuit, and that is not my problem or my concern, I try to do what is right."

Not only were these comments made outside the jury's presence, they did not amount to actual bias. *See U.S. v. Rutgard*, 116 F.3d 1270 (9th Cir. 1997). Moreover, any bias which the jury might have detected was cured by the instruction to the jury not to read into anything that the judge had said or done. *See U.S. v. Sanchez-Lopez*, 879 F.2d 541, 553 (9th Cir. 1989).

In short, while the district judge's remarks and behavior were less than admirable, there is no clear indication of actual bias or that the jury perceived partiality.

VI. Jury Instructions

A. Corporate Officer Liability Instruction

Appellants argue that the district court's jury instruction on officer liability violates *U.S. v. Gibson*, 690 F.2d 697, 701 (9th Cir. 1982). But the language chosen by the district court more than adequately captures the standard in *Gibson*.

B. "Puffing" Instruction

Appellants argue that it was improper for the district court to exclude their "puffing" instruction which distinguished exaggerated statements of opinion as a sales technique from false statements of fact.

However, in *U.S. v. Gay*, 967 F.2d 322, 329 (9th Cir. 1992), this court upheld the rejection of a similar "puffing" instruction, finding that a "good faith" instruction adequately conveyed the gist of a "puffing" defense. Therefore, the district court's inclusion of an instruction on good faith as a complete defense made it unnecessary in this case to include Appellants' "puffing" instruction.

C. Lovett's Withdrawal Instruction

Appellant Lovett argues that the district court misstated the law when it included a jury instruction requiring him to take some "affirmative act" in order to prove withdrawal.

The district court issued the following instruction on withdrawal:

> It is a defense to Count 2 through 21 of the indictment that a defendant withdrew from the scheme.
>
> In order to withdraw from the scheme, a defendant must take some definite, decisive, and affirmative action to disavow himself from the scheme or to defeat the goal or purpose of the scheme.
>
> Merely stopping activities or cooperation or merely being inactive for a period of time is not

> sufficient to constitute the defense of withdrawal. . . .
>
> In deciding if a defendant took a step to disavow or defeat the scheme, you may consider several factors including whether the defendant intentionally alerted law enforcement to the scheme, whether the defendant told others in the scheme that his participation had ended, whether the defendant took steps to correct prior assistance to the group, and whether the defendant attempted to remedy any past act, or attempted to prevent any further progress of the scheme.

Lovett argues that the above instruction contradicts the law in *U.S. v. Lothian*, 976 F.2d 1257, 1261 (9th Cir. 1992), which defines withdrawal as follows: "To withdraw from a conspiracy a defendant must either disavow the unlawful goal of the conspiracy, affirmatively act to defeat the purpose of the conspiracy, or take 'definite, decisive, and positive' steps to show that the [defendant's] disassociation from the conspiracy is sufficient."

Although the district court in this case changed the language and sequence somewhat, it adequately captured all three methods of withdrawal. Therefore, the district court did not misstate the law in its withdrawal instruction.

However, the question remains whether the withdrawal instruction as a whole was misleading. Lovett correctly points out that an employee's resignation, after which he receives no financial benefit from the company, is prima facie evidence of withdrawal. *Lothian*, 976 F.2d at 1264.

Unfortunately, the district court in this case did not include resignation as an example of withdrawal. Nonetheless, we do not believe that the district court abused its discretion. Despite its choice of examples, the district court did not expressly exclude resignation as evidence of withdrawal. Apparently no better language was proposed, and this court in *Lothian* did not require that resignation be expressly highlighted for the jury. Hence, the withdrawal instruction is not a ground for reversal, even though it was less than ideal.

VII. Government Conduct During Closing

Appellants requested a mistrial because the Government showed the jury during closing two exhibits which were not in evidence. First, Appellants complained about the Government's display of Exhibit 449, a complaint letter written by Louis Benthack. But this error was not inflammatory.

Additionally, Appellants complain about the Government's display of two checks showing payment to Lovett. One check had been admitted into evidence as part of Exhibit 21C. Although the other check had not been admitted, that payment to Lovett was evidenced elsewhere – in Exhibit 46E. Thus, it was not prejudicial when the jury asked a question about the check.

VIII. Sufficiency of the Evidence

Appellants attempt to undermine the validity of the jury's verdict. First, they question the credibility of several Government witnesses. But we find no basis to

declare these witnesses per se unreliable, even if some of them testified pursuant to plea agreements with the Government. Furthermore, Appellants are unconvincing in arguing their lack of knowledge of their sales representatives' misrepresentations.

IX. Sentence Enhancement

Section 3A1.1 of the U.S. Sentencing Guidelines instructs courts to increase a sentence by two levels "[i]f the defendant knew or should have known that a victim of the offense was unusually vulnerable due to age, physical or mental condition, or that a victim was otherwise particularly susceptible to the criminal conduct. . . . " U.S Sentencing Guidelines Manual § 3A1.1(b) (1997).

Appellants confuse the issue by arguing that § 3A1.1 does not apply to them under *U.S. v. Castellanos*, 81 F.3d 108 (9th Cir. 1996). There, this court held:

> The appellate courts have consistently refused to find a class of victims to be particularly susceptible to criminal conduct simply because they were statistically more likely to fall prey to defendant's crime. . . .
>
> Especially in cases involving some kind of scheme to defraud, the criminal will typically direct his activities toward those persons most likely to fall victim to the scheme. But all defendants targeting such victims do not necessarily merit a sentence enhancement under § 3A1.1. Otherwise, all but the most unthinking of criminal defendants would be candidates for upward adjustment under § 3A1.1. Instead, the victims

> to whom § 3A1.1 applies are those who are in need of greater societal protection.

Id. at 110-11.

Appellants imply that although many of the victims were elderly, that fact alone is insufficient for enhancement under *Castellanos* – even if statistics show that the elderly are more likely to participate in telemarketing activities.

But this court's concern in *Castellanos* was made in reference to the "particularly susceptible" prong, not the "unusually vulnerable" prong set forth in the guidelines. With regard to the latter, this court noted that the distinction in § 3A1.1(b) between "unusually vulnerable" and "particularly susceptible" suggests that the characteristic of age "may per se render a victim worthy" of special protection. *Id.* at 110. Therefore, the relevant inquiry in this case should not be whether the elderly *per se as a class* constitute vulnerable victims, but whether the Appellants targeted the elderly.

Indeed it appears that the Appellants deliberately targeted the elderly. For example, Appellants specifically suggested that sales representatives "cherry pick" customers with older-generation names like Hazel, Mabel, and Gladys. Moreover, there were various questions devised in order for representatives to assess the age of prospective consumers.

Although the precise percentage of victims that were elderly is in dispute, this case is unlike the situation "where the defendant sold fraudulent securities by mail to the general public and one of the victims happened to be senile." (U.S. Sentencing Guidelines at Comment 2.)

Here, Appellants' victimization of the elderly was much more than coincidence, justifying sentence enhancement under § 3A1.1.

X. DiMartini's Speedy Trial Right

Under 18 U.S.C. § 3161(c)(1), a defendant's trial must commence within 70 days from the date of the indictment or initial court appearance, whichever occurs later. Since the last codefendant was arraigned on January 25, 1996, DiMartini calculates that he should have been tried by April 4, 1996.

In postponing the trial from February 14, 1996 through May 21, 1996, the district court relied on § 3161(h)(8)(A) – the "ends of justice" exception. On appeal, DiMartini argues that the district court failed to satisfy this exception's requirements. *See U.S. v. Clymer*, 25 F.3d 824, 828 (9th Cir. 1994).

Regardless, we need not decide whether the district court satisfied the "ends of justice" exception. We find an alternative basis for excludable delay. Specifically, § 3161(h)(1)(F) excludes "delay resulting from any pre-trial motion, from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion." *See U.S. v. George*, 85 F.3d 1433 (9th Cir. 1996).

On January 24, 1996, DiMartini filed a motion to suppress evidence. This motion was not decided until 61 days later, on March 26, 1996. Under § 3161(h)(1)(F), these 61 days were properly excludable. Thus, DiMartini's right under the Speedy Trial Act was not violated.

In a footnote, DiMartini argues that his right to a speedy trial under the Sixth Amendment to the U.S. Constitution was also violated. Applying the four-factor test given in *Barker v. Wingo*, 407 U.S. 514, 530 (1972), we find no constitutional violation. In particular, we note that DiMartini's failure to prove prejudice pursuant to *Barker* is not excused by *Doggett v. U.S.*, 505 U.S. 647 (1992).

XI. Lovett's Closing Argument

Appellant Lovett contends that the district court improperly restricted his closing argument. He wanted to argue that the Government's failure to play recordings of his sales pitches suggests that the tapes would have shown that the Appellant had not made any misrepresentations.

Granted, the Government's failure to produce relevant evidence within its control gives rise to an inference that the evidence would be unfavorable to it. *U.S. v. Tory*, 52 F.3d 207, 211 (9th Cir. 1995). However, the district court did not abuse its discretion in finding that there was no evidence in the record that tapes of Lovett's sales even existed. Although other sales representatives had testified about their individual experiences with being recorded, there was no direct evidence that Lovett himself had been recorded. When asked, no witness had heard tapes of Lovett specifically.

XII. Lovett's Cross-Examination of Special Agent David Ramey

Appellant Lovett contends that the district court erred in limiting his cross-examination of Special Agent David Ramey ("Ramey"). However, in cross-examining Ramey, Lovett was not attempting to impeach the witness or directly contradict the Government's evidence. More importantly, Appellants concede that Ramey could have been called as a defense witness and questioned then.

In short, this was not a situation where Lovett was precluded from presenting a defense; the district court simply controlled the method by which Lovett raised his defense.

AFFIRMED.